**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**TYLER DIVISION**

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| WINSTON KIM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,<br><br>Plaintiff,<br><br>vs.<br><br>ADEPTUS HEALTH, INC., GREGORY W. SCOTT, THOMAS S. HALL, FRANK R. WILLIAMS JR., and TIMOTHY L. FIELDING,<br><br>Defendants. | **Civil Action No. 6:17-cv-00150-RWS** |
| SASCHA TROLL, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>ADEPTUS HEALTH, INC., GREGORY W. SCOTT, THOMAS S. HALL, FRANK R. WILLIAMS JR. and TIMOTHY L. FIELDING,<br><br>Defendants. | **Civil Action No. 6:17-cv-00241-RWS** |

**MOTION OF ADEPTUS INVESTOR GROUP TO BE APPOINTED LEAD PLAINTIFF AND TO APPROVE PROPOSED LEAD PLAINTIFF'S CHOICE OF COUNSEL**

The Adeptus Investor Group[1] (or "Movant"), a small, cohesive group of five members, hereby respectfully moves this Court for an Order: (1) appointing the Movant as the Lead

[1] The Adeptus Investor Group is comprised of David Swehla, Rodeo Plastic Bag & Film Inc. (through its President, David Swehla), Wissam Mattar, Heriberto Vale and Yixin Shi.

Plaintiff in these Actions[2] pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78u-4(a)(3)(B), as amended by Section 101(b) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"); (2) approving the Movant's selection of the law firms of Pomerantz LLC ("Pomerantz") and Brower Piven, A Professional Corporation ("Brower Piven") as Co-Lead Counsel for the Class and approving MT² Law Group, Mann | Tindel | Thompson ("MT²") as Liaison Counsel for the Class; and (3) granting such other and further relief as the Court may deem just and proper. In support of this motion, Movant submits the following memorandum of law and the Declaration Of Andy Tindel In Support Of The Motion Of The Adeptus Investor Group To Be Appointed Lead Plaintiff And To Approve Proposed Lead Plaintiff's Choice Of Counsel ("Tindel Decl." or "Tindel Declaration"), filed herewith.

## PRELIMINARY STATEMENT

As described in the Loss Chart for the Adeptus Investor Group, attached to the Tindel Declaration at Exhibit B, the Adeptus Investor Group has suffered a loss of approximately $433,979, using the methodology mandated by *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), as a result of its transactions in the securities of Adeptus Health Inc. ("Adeptus" or "Company") between April 29, 2016 and March 1, 2017, inclusive ("Class Period"). To the best of its knowledge, the Adeptus Investor Group has sustained the largest loss of any investor seeking to be appointed Lead Plaintiff.

In addition to demonstrating the largest financial interest in the outcome of this litigation, the Adeptus Investor Group's members' certifications evidence their intent to serve as Lead

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[2] The related securities fraud class actions in this Court include the following cases: *Kim v. Adeptus Health, Inc., et al.*, No. 6:17-cv-00150-RWS (E.D. Tex.; filed on Mar. 10, 2017) ("Kim Action"); and *Troll v. Adeptus Health, Inc., et al.*, No. 6:17-cv-00241-RWS (E.D. Tex.; filed on Apr. 27, 2017) ("Troll Action") (collectively, the "Actions").

Plaintiff in this litigation, including their cognizance of the duties of serving in that role. The members of the Adeptus Investor Group fully understand their duties and responsibilities to the Class, and are willing and able to oversee the vigorous prosecution of these Actions as a representative party. *See* Tindel Decl., Exhibit A. Moreover, the Adeptus Investor Group satisfies both the applicable requirements of the PSLRA and Fed. R. Civ. P. 23 ("Rule 23"), and the Adeptus Investor Group is presumptively the "most adequate plaintiff."

**PROCEDURAL BACKGROUND**

The Kim Action was filed on March 10, 2017 in this Court. On March 10, 2017, the first notice that a class action had been initiated against Defendants was published on *BusinessWire*, a widely-circulated national business-oriented wire service, advising members of the proposed Class of their right to move the Court to serve as Lead Plaintiff no later than 60 days from the notice (May 9, 2017). The Troll Action alleging similar claims against the same Defendants was filed on April 27, 2017.

**STATEMENT OF FACTS**

On April 29, 2016, the Company filed a Form 10-Q for the quarterly period ended March 31, 2016, which attached certifications pursuant to the Sarbanes Oxley Act of 2002 ("SOX") attesting to the accuracy of the financial statements, the disclosure of any material changes to the Company's internal control over financial reporting and the disclosure that all fraud was disclosed. On July 29, 2016, the Company filed a Form 10-Q for the quarterly period ended June 30, 2016, which attached the SOX certifications as well, and stated that management was engaged in the implementation of remediation efforts to address the material weakness that was identified in the Annual Report for the year ended December 31, 2015. On November 9, 2016, the Company filed its 3rd quarter Form 10-Q with the SOX certifications and made the same statement as on July 29, 2016.

However, Defendants failed to disclose that the Company had material weaknesses in its internal control over financial reporting in the areas of revenue recognition, accounts receivable, accounting for a contribution to an unconsolidated joint venture, and accounting for equity in (loss) earnings of unconsolidated joint ventures, which made the Company's Class Period statements materially false and/or misleading or lacking a reasonable basis when made. On March 2, 2017, the Company filed a Form 12b- 25 announcing the delay in the filing of its Form 10-K for the fiscal year ended December 31, 2016 and revealing additional material weaknesses in its internal control over financial reporting in the areas of revenue recognition, accounts receivable, accounting for a contribution to an unconsolidated joint venture, and accounting for equity in (loss) earnings of unconsolidated joint ventures. On this news, the Company's shares fell $3.76 per share or over 57.4% to close at $2.79 per share on March 2, 2017, damaging investors.

## ARGUMENT

## I. THE ADEPTUS INVESTOR GROUP SHOULD BE APPOINTED LEAD PLAINTIFF

### A. The Procedural Requirements Pursuant to the PSLRA

The PSLRA sets forth a strict, detailed procedure for the selection of Lead Plaintiff to oversee a securities class action. *See* 15 U.S.C. §78u-4(a)(3); *Brody v. Zix Corp.*, No. 04-1931, 2005 U.S. Dist. LEXIS 13871, at *3 (N.D. Tex. July 11, 2005).

First, the plaintiff who files the initial action must, within 20 days of filing the action, publish a notice to the Class informing Class members of their right to file a motion for appointment as Lead Plaintiff. *See* 15 U.S.C. §78u-4(a)(3)(A)(i). The plaintiff in the Kim

Action published a notice through *Business Wire* on March 10, 2017. *See* Tindel Decl., Exhibit C. This notice indicated that applications for appointment as Lead Plaintiff were to be made no later than 60 days from the date of the press release, which is May 9, 2017. Within 60 days after publication of the required notice, any member or members of the proposed Class may apply to the Court to be appointed as Lead Plaintiff, whether or not they have previously filed a complaint in the Actions. 15 U.S.C. §78u-4(a)(3)(A) and (B).

Next, the PSLRA requires that within 90 days after publication of the initial notice of pendency of the action, the Court shall appoint as Lead Plaintiff the movant that the Court determines to be the most capable of adequately representing the interests of Class Members. 15 U.S.C. §78u-4(a)(3)(B)(i); *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 440 (S.D. Tex. 2002). In making this determination, the statute directs the Court to the following objective criteria:

> [T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this title is the person or group of persons that—
>
> (aa) has either filed the complaint or made a motion in response to a notice…
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. §78u-4(a)(3)(B)(iii).

### B. The Adeptus Investor Group Is "The Most Adequate Plaintiff"

#### 1. The Adeptus Investor Group Has Complied With the PSLRA and Should Be Appointed Lead Plaintiff

The Adeptus Investor Group moves this Court to be appointed Lead Plaintiff and has timely filed the instant motion to be appointed Lead Plaintiff within the 60-day time period required by the PSLRA. Moreover, the Adeptus Investor Group has the largest known financial interest in the relief sought by the Class. Further, the members of the Adeptus Investor Group have shown their willingness to represent the Class by signing sworn certifications detailing their investments in Adeptus securities during the Class Period and confirming their willingness to discharge the obligations of class representatives in these Actions. *See* Tindel Decl., Exhibit A.

Small cohesive groups like the Adeptus Investor Group have routinely been appointed as Lead Plaintiff in securities class actions. *Weltz v. Lee*, 199 F.R.D. 129, 133 (S.D.N.Y. 2001); *see also City of Sterling Heights Gen. Employees Ret. Sys. v. Hospira, Inc*., No. 11-8332, 2012 U.S. Dist. LEXIS 54081, at *22-*24 (N.D. Ill. Apr. 18, 2012); *In re First Union Corp.*, 157 F. Supp. 2d 638, 643 (W.D.N.C. 2000); *Schulman v. Lumenis, Ltd.*, No. 02-1989, 2003 U.S. Dist. LEXIS 10348, at *21-*22 (S.D.N.Y. June 18, 2003); *In re Universal Access, Inc.*, 209 F.R.D. 379, 388 (E.D. Tex. 2002) (granting the motion of six individuals and an investment firm, known as the Frandsen Group, to be appointed lead plaintiffs); *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 44-46 (S.D.N.Y. 1998) (holding that "the plain language of the PSLRA expressly contemplates the appointment of more than one lead plaintiff").

Finally, the Adeptus Investor Group has selected and retained highly competent counsel with significant experience in securities class action litigation and other complex litigation to represent the Class. The firm résumés of proposed Co-Lead Counsel, Pomerantz and Brower Piven, and proposed Liaison Counsel, MT$^2$, are attached as Exhibits D, E and F, respectively, to the Tindel Declaration.

**2. The Adeptus Investor Group Has the Largest Financial Interest**

According to 15 U.S.C. §78u-4(a)(3)(B)(iii), the Court shall appoint as Lead Plaintiff the movant or movants who have the largest financial interest in the relief sought by the action. *See In re Cavanaugh*, 306 F.3d 726, 732 (9th Cir. 2002). As demonstrated by Exhibit B to the

Tindel Declaration, using the methodology mandated by *Dura*, 544 U.S. 336, 338 (2005),[3] the Adeptus Investor Group has losses of approximately $434,758. Therefore, the Adeptus Investor Group satisfies the PSLRA's prerequisite of having "the largest financial interest in the relief sought by the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc).

**3. The Adeptus Investor Group Satisfies the Requirements of Rule 23**

According to 15 U.S.C. §78u-4(a)(3)(B), in addition to possessing the largest financial interest in the outcome of the litigation, the Lead Plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." *See In re Enron,* 206 F.R.D. at 442. Rule 23(a) provides that a party may serve as a class representative if the following four requirements are satisfied:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Of the four prerequisites to class certification, only two – typicality and adequacy – directly address the personal characteristics of the class representative. *See In re Waste Mgmt., Inc.*, 128 F. Supp. 2d 401, 411 (S.D. Tex. 2000). Consequently, in deciding a motion to serve as Lead Plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule

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[3] Courts have approved and recognized this method for calculating losses. *See, e.g.*, *Prefontaine v. Research In Motion Ltd.*, No. 11-4068, 2012 U.S. Dist. LEXIS 4238, at *9-*10 (S.D.N.Y. Jan. 5, 2012); *Marjanian v. Allied Nevada Gold Corp.*, No. 3:14-cv-0175-LRH-WGC, Order (D. Nev. Nov. 7, 2014), *aff'd*, 2015 U.S. Dist. LEXIS 2782 (D. Nev. Jan. 8, 2015); *Espinoza v. Whiting*, No. 4:12-1711, 2013 U.S. Dist. LEXIS 6227, at *10 (E.D. Mo. Jan. 16, 2013); *K-V Pharm. Co. Sec. Litig.*, No. 4:11-1816, 2012 U.S. Dist. LEXIS 62161, at *11 (E.D. Mo. May 3, 2012); *Shah v. GenVec, Inc.*, No. 8:12-00341, Order (D. Md. Apr. 26, 2012); *Perlmutter v. Intuitive Surgical, Inc.*, No. 10-03451, 2011 U.S. Dist. LEXIS 16813, at *15 (N.D. Cal. Feb. 15, 2011); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-01825, 2007 U.S. Dist. LEXIS 14878, at *13 (E.D.N.Y. Mar. 2, 2007).

23(a), and defer examination of the remaining requirements until the Lead Plaintiff moves for class certification. *See In re Enron*, 206 F.R.D. at 442.

As detailed below, the Adeptus Investor Group satisfies both the typicality and adequacy requirements of Rule 23, thereby justifying its appointment as Lead Plaintiff. The Adeptus Investor Group has claims that are typical of those of other Class members and can adequately serve as Lead Plaintiff.

#### i. The Adeptus Investor Group's Claims Are Typical Of the Claims Of All The Class Members

Under Rule 23(a)(3), typicality exists where "the claims … of the representative parties" are "typical of the claims … of the class." The typicality requirement of Rule 23(a)(3) is satisfied when the representative plaintiff's claims arise from the same event or course of conduct that gives rise to claims of other class members, and when the claims are based on the same legal theory. *See Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002) (citing *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001)); *In re Enron Corp. Sec. Litig.*, 206 F.R.D. at 445. In this case, the typicality requirement is met because the claims of the Adeptus Investor Group are identical to, and non-competing and non-conflicting with, the claims of the other Class members. The members of the Adeptus Investor Group transacted in Adeptus securities during the Class Period when the prices were artificially inflated as a result of Defendants' misrepresentations and omissions, and thus, the members of the Adeptus Investor Group and the Class members suffered damages as a result of these transactions. Therefore, the Adeptus Investor Group's claims are like "the claims of each member of the class [and] arise from the same events leading to the same typical claims." *Stirman*, 208 F.3d at 562. The Adeptus Investor Group is not subject to any unique or special defenses. Thus, the Adeptus Investor

Group meets the typicality requirement of Rule 23 because its claims are the same as the claims of the other Class members.

**ii. The Adeptus Investor Group Will Adequately Represent the Class**

Under Rule 23(a)(4), the representative party must "fairly and adequately protect the interests of the class." The PSLRA directs the Court to limit its inquiry regarding the adequacy of the movant to whether the interests of the movant are clearly aligned with the members of the putative Class and whether there is evidence of any antagonism between the interests of the movant and other members of the Class. 15 U.S.C. §78u-4(a)(3)(B).

The Adeptus Investor Group's interests are clearly aligned with those of the other members of the Class. Not only is there no evidence of antagonism between the members of the Adeptus Investor Group and the other Class members, but the Adeptus Investor Group has a significant, compelling interest in prosecuting these Actions to a successful conclusion having lost such a substantial amount of money, as a result of the wrongful conduct alleged in these Actions. This motivation, combined with the Adeptus Investor Group's identical interests with the members of the Class, demonstrates that the Adeptus Investor Group will vigorously pursue the interests of the Class.

In sum, because of the Adeptus Investor Group's common interests with the Class members, its clear motivation and ability to vigorously pursue these Actions, and its competent counsel, the Adeptus Investor Group meets the adequacy requirement of Rule 23 of the Federal Rules of Civil Procedure. Since the Adeptus Investor Group meets both the typicality and adequacy requirements of Rule 23, and has sustained the largest amount of losses from Defendants' alleged wrongdoing, the Adeptus Investor Group is the presumptive Lead Plaintiff in accordance with 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), and should be appointed as such to lead this Action.

## II. THE COURT SHOULD APPROVE THE ADEPTUS INVESTOR GROUP'S CHOICE OF LEAD COUNSEL

The PSLRA vests authority in the Lead Plaintiff to select and retain counsel to represent the Class, subject to the Court's approval. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). This Court should not disturb the Lead Plaintiff's choice of counsel unless it is necessary to "protect the interests of the class." 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa).

The Adeptus Investor Group has selected Pomerantz and Brower Piven to serve as Co-Lead Counsel and MT² to serve as Liaison Counsel for the Class. Pomerantz and Brower Piven have not only prosecuted complex securities fraud class actions, but have also successfully prosecuted many other types of complex class actions as lead and/or class counsel. *See* Tindel Decl., Exhibits D & E. In addition, MT² is a well-respected law firm, and its attorneys have experience litigating complex commercial actions. *See* Tindel Decl., Exhibit F. This Court may be assured that in the event that the Adeptus Investor Group's motion is granted, the members of the Class will receive the highest caliber of legal representation.

## CONCLUSION

For all of the foregoing reasons, the Adeptus Investor Group respectfully requests that this Court enter an order (1) appointing the Adeptus Investor Group to serve as Lead Plaintiff; (2) approving the Adeptus Investor Group's selection of Co-Lead Counsel and Liaison Counsel for the Class; and (3) granting such other and further relief as the Court may deem just and proper.

Dated: May 9, 2017

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

This is to certify that all known counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per E. Dist. Tex. Loc. Ct. R. CV-5(a)(3) on this the 9th of May, 2017. Any other known counsel of record will be served with a copy of this document by email and/or facsimile transmission

Andy Tindel

**CERTIFICATE OF CONFERENCE**

This motion for appointment as lead plaintiff and approval of selection of counsel has been filed pursuant to §21D of the Securities Exchange Act of 1934, 15 U.S.C. §78u-4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995. Per these statutory requirements, within 60 days after publication of the required notice, any member or members of the proposed class may apply to the Court to be appointed as lead plaintiff, whether or not they have previously filed a complaint in this action.

As a result, any potential party to the action is aware of the requirements for filing a lead plaintiff motion. However, due to the nature of the filing, counsel has no way of knowing which class members will be filing competing lead plaintiff motions at this time. Therefore, counsel for movant has been unable to "meet and confer" with other counsel filing lead plaintiff motions, whom movant believes would be regarded as opposing counsel for purposes of Local Rule CV-7(h), and thus believes such conference attempts are not possible at this stage of the litigation.

Andy Tindel